YB Teresa Kok Suh Sim v Menteri Dalam Negeri, Malaysia, YB Dato' Seri Syed Hamid bin Syed Jaafar Albar & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(W)-146–05 OF 2015
ABANG ISKANDAR, VARGHESE GEORGE AND ZALEHA YUSOF JJCA
26 JULAI 2016

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Civil Procedure — Courts — Jurisdiction of High Court — Judicial precedent — Principle of stare decisis — Whether trial judge erred in holding that High Court bound by precedent set by immediately higher court in curial hierarchy (Court of Appeal) and not highest court of the land — Whether High Court bound to follow Court of Appeal's decision in Borhan's case — Whether decision of Federal Court in Mohamed Ezam's case that centred on same issue should be adopted

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Constitutional Law — Fundamental liberties — Arrest and detention under s 73(1) of the ISA — Writ action for damages for unlawful arrest and detention — Whether test to be applied in determining validity of arrest and detention under s 73(1) of the ISA should be objective test — Whether there were sufficient and reasonable grounds behind belief that arrest was necessary — Whether arrest for mala fide ends — Whether objectives of police were to use powers vested in them under ISA for legitimate purpose — Whether there was sufficient evidence to justify arrest — Whether appellate intervention warranted — Damages — General damages — Whether appellant should also be awarded aggravated and exemplary damages

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The appellant was at all material times the Member of Parliament for Seputeh, the State Assemblywoman for Kinrara and a Senior Executive Council Member of the Selangor State Government. On 12 September 2008, the appellant was arrested at the entrance of her residence by a group of police officers led by DSP E Kim Tien ('the third respondent') on the instructions of his superior officer. The appellant was later informed that she was being arrested and detained under s 73(1) of the Internal Security Act 1960 ('the ISA'). During her period of detention in the Police Remand Centre from 13 September 2008 until 19 September 2008 she was continually held in solitary confinement, under allegedly inhumane conditions, deprived of her constitutional rights and not allowed reasonable access to her lawyer or her family members. On 19 September 2008, she was released unconditionally after police investigations showed that she was not a threat to public order and

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security and that there was no reason to detain her further. The appellant filed a writ action for damages for unlawful arrest and detention by the police. In their defence the police claimed that they had sufficient and reasonable grounds to order the arrest of the appellant. According to the police there were allegations that the appellant had been involved in a protest against Jawi signages and in a petition to reduce the volume of the *azan* at the Masjid Bandar Kinrara 5. The trial judge felt constrained purportedly by the 'principle of stare decisis' or 'bound by precedent' to opt and apply the subjective test as propounded by the Court of Appeal in the case of *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329 ('*Borhan*'s case'), which held that it was sufficient for the arresting officer to state that he had reasons to believe that the person being arrested was involved in activities prejudicial to the national security to justify the arrest under s 73(1) of the ISA. The trial judge also found that as the third respondent, who was the arresting officer in the present case, had informed the appellant that she was being arrested pursuant to the provisions of s 73(1) of the ISA, following *Borhan*'s case there was no further requirement on the respondents to justify that arrest. Thus, the High Court dismissed the appellant's writ action and ordered the appellant to pay costs of RM50,000. This was the appellant's appeal against that decision on the grounds that the trial judge's understanding of stare decisis was flawed and that she had misdirected herself in adopting the subjective approach as propounded by *Borhan*'s case. It was the appellant's case that the concept of 'stare decisis', required all courts in the land, irrespective of their position in the hierarchy of courts, to follow what had been expounded and laid down by the highest court of the land on any specific aspect of law. Thus, the appellant submitted that the test to be applied in determining the validity of an arrest and detention under s 73(1) of the ISA was an objective test, which required the court to examine and assess whether that power to arrest had been exercised on reasonable and fair grounds. In addition, the appellant argued that the order of costs of RM50,000 made against the appellant upon the dismissal of her suit was excessive and ought to be set aside or varied.

Held, allowing the appeal with costs of RM70,000:

(1) If a High Court decision on a particular issue of law had been eventually overruled by the Federal Court, the decision of the Federal Court would prevail as the law of the land and even a magistrate's court would, on a similar issue arising before it, be bound by the Federal Court's enunciation of the law. This was an essential aspect of judicial discipline required within our court system. The trial judge was therefore clearly in error, to ignore the more relevant exposition as to what stare decisis amounted to. There was no compulsion on the trial judge to consider that the High Court was bound to follow *Borhan*'s case, a Court of Appeal decision, and exclude the Federal Court decision in *Mohamed*

Ezam's case, which also centred on an arrest and detention under s 73(1) of the ISA and the correct approach to be adopted when a challenge was mounted as to the validity of any such arrest and detention. Notwithstanding that *Borhan*'s case was a later decision, there was no valid basis not to follow the principles of law laid down and sanctioned by the Federal Court in *Mohamed Ezam*'s case. *Mohamed Ezam*'s case remained the authority that required the court to enquire whether the impugned arrest was effected for the dominant purpose and whether there were sufficient and reasonable grounds behind the belief that such arrest was necessary and that the arrest was not for any mala fide ends. There was also no valid reason to differentiate the test to be applied in the case of a judicial review proceeding, ie *Mohamed Ezam*'s case, and in a writ action such as the present case involving the same question to be determined by the court (see paras 17, 19, 21 & 41–42).

(2) When an arrest and detention under s 73(1) of the ISA was challenged the test to be applied had to be the objective one because by the introduction of s 8B of the ISA only the Minister's decision under s 8(1) of the ISA was expressly barred from being challenged in court. Further, the power granted to a police officer to arrest without warrant under s 73(1) of the ISA was not couched in open ended terms but was restricted to be used only where there were grounds for detention under s 8 of the ISA or the person detained had acted or was about to act in a manner prejudicial to the security of the country or the maintenance of essential services or the nation's economic life. Where the objectives behind the exercise of any power were specifically spelt out, it would naturally follow that the use of that power was limited for those purposes and was to be justified by the person using that power that it had been properly invoked (see paras 43 & 47–48).

(3) The allegations that the appellant was involved in a protest against Jawi signages and the allegation that the appellant was involved in a petition to reduce the volume of the *azan* at the Masjid Bandar Kinrara 5 were unsupported by documentary or oral evidence. The fact that the alleged involvements had taken place in February 2008 and the appellant was only arrested some seven months later showed that there was no basis for these allegations against the appellant. Based on an assessment of the circumstances surrounding the cited grounds for belief leading to the arrest and detention of the appellant it was clear that there was no immediate or imminent act of the appellant that justified the use of powers under s 73(1) of the ISA to incarcerate the appellant and trample upon her basic rights and freedom as guaranteed in the Federal Constitution. It was also obvious from the total indifference by the police to conduct a thorough investigation that the objectives of the police were

not to use the powers vested in them under the ISA for any legitimate purpose as required under the provisions of the ISA but for an unrelated ulterior motive. Further, it was always open to the police to use other avenues to deal with the appellant, even if there were merits in the complaints raised implicating the appellant. The respondents had failed to show the court credible and sufficient material to establish that the arresting officer or his superiors had reasonable and substantive grounds to support their belief that the arrest of the appellant was urgently required to meet the ends as provided in s 73(1) of the ISA (see paras 52 & 66–69).

(4) The appeal warranted appellate intervention as clearly the trial judge had misdirected herself on the law as to the correct to be applied, and had not given sufficient or due consideration to all the materials placed before the court. As such, the order of the High Court including the order of costs should be set aside (see paras 70–71).

(5) Apart from general damages, the circumstances and matters surrounding this case warrant an order for exemplary and aggravated damages against the respondents. Having taken into consideration the appellant's status and position at the material time, the respondents were ordered to pay the appellant RM200,000 as general damages and RM150,000 as aggravated and exemplary damages (see paras 72 & 76).

[Bahasa Malaysia summary

Perayu adalah pada setiap masa matan Ahli Parlimen Seputeh, Adun Negeri bagi Kinrara dan Ahli Majlis Eksekutif Kanan Kerajaan Negeri Selangor. Pada 12 September 2008, perayu telah ditangkap di pintu masuk kediamannya oleh sekumpulan pegawai polis yang diketuai oleh DSP E Kim Tien ('responden ketiga') atas arahan pegawai atasannya. Perayu kemudiannya dimaklumkan bahawa dia telah ditangkap dan ditahan di bawah s 73(1) Akta Keselamatan Dalam Negeri 1960 ('ISA'). Dalam tempoh dia berada dalam tahanan di Pusat Reman Polis dari 13 September 2008 hingga 19 September 2008 dia terus ditahan dalam kurungan, di bawah keadaan yang didakwa tidak berperikemanusiaan, dinafikan hak perlembagaannya dan tidak dibenarkan akses yang munasabah kepada peguamnya atau ahli keluarganya. Pada 19 September 2008, dia telah dibebaskan tanpa syarat selepas siasatan polis menunjukkan bahawa dia bukan satu ancaman kepada ketenteraman dan keselamatan awam dan bahawa tiada sebab untuk menahannya selanjutnya. Perayu telah memfailkan writ tindakan untuk ganti rugi bagi tangkapan dan penahanan yang menyalahi undang-undang oleh polis. Dalam pembelaan mereka polis telah mendakwa bahawa mereka mempunyai alasan mencukupi dan munasabah untuk memerintah tangkapan perayu. Menurut polis terdapat dakwaan bahawa perayu terlibat dalam bantahan terhadap papan tanda Jawi

dan dalam petisyen untuk mengurangkan bunyi azan di Masjid Bandar Kinrara 5. Hakim perbicaraan merasakan dikekang pleh 'prinsip stare decisis atau 'bound by precedent ' untuk memilih dan menggunakan ujian subjektif seperti dikemukakan oleh Mahkamah Rayuan dalam kes *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329 ('kes *Borhan*'), yang menyokong bahawa ia adalah mencukupi untuk pegawai yang melakukan tangkapan menyatakan bahawa dia mempunyai sebab untuk mempercayai bahawa orang yang ditangkap terlibat dalam aktiviti yang memudaratkan keselamatan negara bagi mewajarkan tangkapan di bawah s 73(1) AKDN. Hakim perbicaraan juga mendapati bahawa sebagai responden ketiga, yang merupakan pegawai yang membuat tangkapan dalam kes ini, telah memberitahu perayu yang dia telah ditangkap menurut peruntukan s 73(1) AKDN, berikutan kes Borhan tidak terdapat keperluan untuk responden-responden mewajarkan tangkapan tersebut. Oleh itu, Mahkamah Tinggi telah menolak writ tindakan perayu dan memerintahkan perayu membayar kos RM50,000. Ini adalah rayuan perayu terhadap keputusan tersebut atas alasan bahawa pemahaman hakim perbicaraan berhubung stare decisis tidak begitu berkesan dan bahawa beliau telah salah arah dalam menggunakan pendekatan subjektif seperti mana dinyatakan dalam kes *Borhan*. Ia adalah kes perayu bahawa konsep 'stare decisis', menghendaki semua mahkamah, tidak kira kedudukan mereka dalam hierarki mahkamah, untuk mengikut apa yang dijelas dan dibentang oleh mahkamah tertinggi berhubung apa-apa aspek perundangan yang spesifik. Oleh itu, perayu berhujah bahawa ujian untuk digunakan dalam menentukan kesahan tangkapan dan penahanan di bawah s 73(1) AKDN adalah ujian yang objektif, yang memerlukan mahkamah memeriksa dan menilai sama ada kuasa untuk menangkap telah dilaksanakan atas alasan yang munasabah dan adil. Tambahan pula, perayu berhujah bahawa perintah untuk kos RM50,000 telah dibuat terhadap perayu selepas penolakan guamannya yang melampau dan patut diketepikan atau diubah.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM70,000:

(1) Jika keputusan Mahkamah Tinggi berhubung isu undang-undang yang khusus telah akhirnya ditolak oleh Mahkamah Persekutuan, keputusan Mahkamah Persekutuan akan kekal sebagai undang-undang tertinggi dan malah mahkamah majistret akan, atas isu sama yang timbul di hadapannya, terikat dengan keputusan undang-undang Mahkamah Persekutuan. Ini adalah aspek penting dalam bidang kehakiman yang diperlukan dalam sistem mahkamah. Hakim perbicaraan dengan itu jelas terkhilaf, untuk mengabaikan pendedahan yang lebih relevan berhubung apa yang dimaksudkan dengan stare decisis. Tiada paksaan ke atas hakim perbicaraan untuk mengambil kira bahawa Mahkamah Tinggi terikat untuk mengikut kes *Borhan*, keputusan Mahkamah Rayuan, dan mengecualikan keputusan Mahkamah Persekutuan dalam kes *Mohamed*

Ezam, yang juga berkisarkan tangkapan dan penahanan d bawah s 73(1) AKDN dan pendekatan wajar untuk digunakan apabila cabaran ditimbulkan berhubung kesahan apa-apa tangkapan dan penahanan. Walau apa pun kes *Borhan* adalah keputusan terkemudian, tiada asas sah untuk tidak mengikut prisip-prinsip undang-undang yang dibentangkan dan disanksikan oleh Mahkamah Persekutuan dalam kes *Mohamed Ezam*. Kes *Mohamed Ezam* kekal sebagai autoriti yang memerlukan mahkamah menyiasat sama ada tangkapan yang dipersoalkan dilaksanakan bagi tujuan yang penting dan sama ada terdapat alasan mencukupi dan munasabah atas kepercayaan bahawa tangkapan tersebut adalah perlu dan bahawa tangkapan itu tidak dilakukan dengan tujuan niat jahat. Juga tiada sebab sah untuk membezakan ujian yang terpakai dalam kes tentang prosiding semakan semula penghakiman, iaitu kes *Mohamed Ezam*, dan dalam writ tindakan seperti mana dalam kes ini melibatkan persoalan sama untuk ditentukan oleh mahkamah (lihat perenggan 17, 19, 21 & 41–42).

(2) Apabila tangkapan dan penahanan di bawah s 73(1) AKDN dicabar ujian yang terpakai adalah secara objektif kerana dengan pengenalan s 8B AKDN hanya keputusan Menteri di bawah s 8(1) AKDN secara nyata dihalang daripada dicabar di mahkamah. Selanjutnya, kuasa yang diberikan kepada pegawai polis tanpa waran di bawah s 73(1) AKDN tidak diungkapkan dalam terma dari semua segi tetapi terbatas untuk digunakan hanya di mana terdapat alasan untuk penahanan di bawah s 8 AKDN atau orang yang ditahan telah bertindak atau akan membuat tindakan yang bersifat prejudis kepada keselamatan negara atau pemeliharaan perkhidmatan penting atau jangka hayat ekonomi negara. Di mana objektif di sebalik pelaksanaan apa-apa kuasa yang dinyatakan secara khusus, ia dengan semula jadi akan mengikut bahawa penggunaan kuasa tersebut adalah terhad bagi tujuan tersebut dan perlu dibenarkan oleh orang yang menggunakan kuasa tersebut bahawa ia telah digunakan dengan sewajarnya (lihat perenggan 43 & 47–48).

(3) Pengataan bahawa perayu terlibat dalam bantahan terhadap papan tanda Jawi dan pengataan bahawa perayu terlibat dalam petisyen untuk mengurangkan bunyi azan di Masjid Bandar Kinrara 5 tidak disokong oleh keterangan dokumentar atau lisan. Fakta bahawa penglibatan yang dikatakan itu telah berlaku pada Februari 2008 dan perayu hanya ditangkap tujuh bulan kemudian menunjukkan bahawa tiada asas untuk pengataan tersebut terhadap perayu. Berdasarkan penilaian tentang keadaan berkisarkan alasan yang dinamakan untuk kepercayaan yang membawa kepada tangkapan dan penahanan perayu ia adalah jelas bahawa tiada tindakan segera atau pasti perayu yang telah mewajarkan penggunaan kuasa di bawah s 73(1) AKDN untuk mengurung perayu dan menginjak atas hak asasi dan kebebasannya sebagaimana yang dijamin dalam Perlembagaan Persekutuan. Ia juga jelas berdasarkan

ketidakprihatinan langsung oleh polis untuk menjalankan siasatan terperinci bahawa objektif polis bukan untuk menggunakan kuasa yang diberikan pada mereka di bawah AKDN untuk apa-apa tujuan sah sebagaimana dikehendaki di bawah peruntukan-peruntukan AKDN tetapi untuk motif tersembunyi yang tiada kaitan. Selanjutnya, ia terbuka untuk polis menggunakan cara lain bagi mengendalikan perayu, jika pun terdapat merit dalam aduan yang ditimbulkan yang membabitkan perayu. Responden telah gagal menunjukkan mahkamah bahan yang boleh dipercayai dan mencukupi bagi membuktikan bahawa pegawai yang menyiasat atau orang atasannya mempunyai alasan yang munasabah dan substantif bagi menyokong kepercayaan mereka bahawa tangkapan perayu amat diperlukan untuk memenuhi matlamat sebagaimana diperuntukkan dalam s 73(1) AKDN (lihat perenggan 52, 66–69).

(4) Rayuan itu mewajarkan campur tangan perayu kerana adalah jelas hakim perbicaraan telah salah arah berhubung undang-undang yang patut terpakai, dan tidak memberikan pertimbangan mencukupi atau sewajarnya bagi semua material yang dikemukakan di hadapan mahkamah. Oleh itu, perintah Mahkamah Tinggi termasuk perintah untuk kos patut diketepikan (lihat perenggan 70–71).

(5) Selain daripada ganti rugi am, keadaan dan perkara yang berkisar kes ini mewajarkan satu perintah untuk ganti rugi teladan dan tambahan terhadap responden. Setelah membuat pertimbangan status dan kedudukan perayu pada masa matan, responden-responden telah diperintahkan untuk membayar perayu RM200,000 sebagai ganti rugi dan RM150,000 sebagai ganti rugi tambahan dan teladan (lihat perenggan 72 & 76).]

Notes

For cases on fundamental liberties in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2626–2903.

Cases referred to

Borhan bin Hj Daud & Ors v Abd Malek bin Hussin [2010] 6 MLJ 329; [2010] 8 CLJ 656, CA (overd)

Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors [2002] 1 MLJ 321; [2010] 3 MLJ 307, FC (consd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

Kam Teck Soon v Timbalan Menteri Dalam Negeri & Ors and other appeals [2003] 1 MLJ 321, FC (refd)

Miliangos Respondent and George Frank (textiles) Ltd Appellants [1976] AC 443, HL (refd)

Mohamad Ezam Mohd Nor & Ors v Inspector General of Police [2001] 2 MLJ 481, HC (refd)

A *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2002] 4 CLJ 309, FC (folld)
O'Hara v Chief Constable of the Royal Ulster Constabulary [1997] 1 All ER 129, HL (refd)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)
B *Sistem Televisyen Malaysia Bhd & Ors v Nurullah bt Zawawi & Anor* [2015] 6 MLJ 703; [2015] 9 CLJ 357, CA (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)

C **Legislation referred to**

Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(1), 4(1)
Federal Constitution art 5(3)
Internal Security Act 1960 ss 8, 8(1), 8A, 8B, 8C, 73, 73(1), (1)(a), (b)
D Penal Code ss 298, 298A(1)

Appeal from: Civil Suit No S21–49 of 2009 (High Court, Kuala Lumpur)

Sankara Nair (K Murali with him) (SN Nair & Partners) for the appellant.
E *Lailawati bt Ali (Mohamad Abazafree bin Mohd with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Varghese George JCA:

F BACKGROUND

[1] This appeal before us was against the dismissal by the High Court at Kuala Lumpur of the appellant's writ action for damages for unlawful arrest and detention by the police. In dismissing the suit, the High Court had also
G ordered the appellant to pay the respondents costs in the sum of RM50,000.

[2] At the time of the impugned arrest and detention, the appellant was the Member of Parliament for Seputeh, the State Assemblywoman for Kinrara and a Senior Executive Council Member of the Selangor State Government.

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[3] It was alleged that on 12 September 2008 at about 11.50pm, the appellant was arrested at the entrance gate of her residence in Pearl Tower OG Heights Condominium at Jalan Awan Cina, Kuala Lumpur, by a group of police officers led by the third respondent. She alleged that for the first two
I hours of her arrest, she was not told where she was taken to and she was not allowed to contact her next of kin or her lawyer. She apparently had been taken to Wangsa Maju Police Station and only after about two hours of her arrest she was informed by the third respondent that she was being arrested and detained under s 73(1) of the Internal Security Act 1960 ('the ISA').

[4] Later at about 3am on 13 September 2008, the appellant was taken to the Police Remand Centre ('the PRC') and was detained there until her release at about 1.40pm on 19 September 2008. The appellant alleged that during the period of detention she was continually held in solitary confinement, lived under inhumane conditions, was deprived of all her constitutional rights and was not allowed reasonable access to her lawyer or her family members.

[5] After her release, on 19 September 2008 the Deputy Inspector General of Police issued a formal press statement, that was subsequently reported in the *New Straits Times* dated 20 September 2008 to the effect that the appellant had been released unconditionally because 'the police was satisfied that she was not a threat to public order and security'. The first respondent was also quoted by the same newspaper on the same day as having said that 'police investigation showed that there was no reason to detain her further under s 8 of the ISA 1960.

[6] Relying on these two reported statements, the appellant contended that the respondents had been negligent and reckless in carrying out their duties and responsibilities and had abused their powers under the law. The appellant claimed, that as a public officer and by virtue of her position, the unlawful arrest had deprived her of being able to perform her official duties and had also deprived her of her freedom.

DECISION OF THE HIGH COURT

[7] Principally, in coming to her decision, the learned trial judge took the position that the High Court was duty bound based on, what was attributed to, the doctrine of stare decisis, to follow the decision of its immediately superior court, namely, the Court of Appeal, in *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* [2010] 6 MLJ 329; [2010] 8 CLJ 656 ('*Borhan*'s case'), notwithstanding that the decision in *Borhan*'s case was admittedly 'in conflict' with or 'may run counter' to decisions of the Federal Court or even of the House of Lords (paras 216 and 220 of the grounds of judgment of the High Court).

[8] Her Ladyship identified the particular decisions of the Federal Court, which the High Court had opted not to follow as:

(a) *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307 ('*Darma Suria*'s case');

and

(b) *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2002] 4 CLJ 309 ('*Mohamed Ezam*'s case').

[9] The learned trial judge also found that the arresting officer ('the third respondent/DW1') had informed the appellant that she was being arrested pursuant to the provisions of s 73(1) of the ISA and following *Borhan*'s case there was no further requirement on the respondents to satisfy the court by adducing any particulars or material evidence to justify that arrest.

[10] It was also held by the learned trial judge that the appellant was not mistreated during the period of her seven day detention and neither were the respondents (or their agents or servants) reckless or negligent nor had they acted outside the powers entrusted to them, when they discharged their duties.

THE APPEAL

[11] The pivotal contention of the appellant in this appeal was that the test to be applied when the validity of an arrest and detention under s 73(1) of the ISA was being challenged was an objective one, to wit, the courts were entitled to examine and assess whether that power to arrest had been exercised on reasonable and fair grounds. To that end, sufficient particulars and details to the satisfaction of the court had to be adduced by those who carried out that arrest.

[12] In this regard it was argued that, the learned trial judge's understanding of stare decisis, namely, the concept of binding judicial precedent, was flawed. Her Ladyship was therefore in error and had misdirected herself in adopting the subjective approach based on the Court of Appeal decision in *Borhan*'s case when called to construe s 73(1) of the ISA.

[13] As a subsidiary issue in appeal, it was also submitted that the order of costs of RM50,000 made against the appellant upon dismissal of the appellant's suit, was *in any event*, excessive and ought to be set aside, if not varied.

[14] The respective submissions of the parties related to the issues that arose in appeal are adverted to in the course of our following deliberations.

OUR DELIBERATION AND DECISION

Stare decisis

[15] A reading of the grounds of judgment indicated to us that learned trial judge felt constrained purportedly by 'the principle of stare decisis', to opt and apply the subjective test as propounded by the Court of Appeal in *Borhan*'s case. In Her Ladyship's construct the High Court was bound by a precedent set by the immediately higher court in the curial hierarchy (here the Court of

Appeal) and not necessarily by the law as laid out by the highest court of the land. For this, the learned trial judge relied upon a statement in the speech of Lord Simon of Glaisdale in the House of Lords in *Miliangos Respondent and George Frank (textiles) Ltd Appellants* [1976] AC 443.

[16] Senior federal counsel for the respondents maintained that the learned trial judge was not wrong in Her Ladyship's understanding of what amounted to a binding precedent. It was the appellant's submission on the other hand that such a limiting effect sought to be ascribed to the concept of 'stare decisis' flew in the face of decided authorities within our own jurisdiction which required all courts in the land, irrespective of their position in the hierarchy of courts, to follow what had been expounded and laid down by the highest court of the land on any specific aspect of law.

[17] We agreed with the submissions of the appellant on this issue. For instance, if a High Court decision on particular issue of law has been eventually overruled by Federal Court, the decision of the Federal Court would prevail as the law of the land and even a magistrate's court would, on a similar issue arising before it, be bound by the Federal Court's enunciation of the law. This has been jealously guarded as an essential aspect of judicial discipline required within our court system.

[18] The following passage from the decision of the Federal Court in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 wherein Steve Shim CJ (Sabah and Sarawak) citing Gopal Sri Ram JCA in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, is illustrative of this position:

> [2] ... It is axiomatic to state that the doctrine of stare decisis has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. In *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, Chang Min Tat FJ had occasion to restate the doctrine in words which are poignantly clear when he said (at p 277):
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> > It is ... necessary to reaffirm the doctrine of stare decisis which the *Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly*.
>
> [3] *Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules as well as for the courts and lawyers to regulate their affairs.* Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system. This fact was certainly borne in mind by the Court of Appeal in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 wherein Gopal Sri Ram JCA said (at p 582):
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> > We may add that it does not augur well for judicial discipline when a High Court judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of state decisis. We trust that the

A occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein.

B [4] The observation is but a stark reminder to judges of the importance of adhering to this doctrine ...

(Emphasis added.)

C **[19]** The learned trial judge was therefore clearly in error, in our respectful view, to ignore the more relevant exposition as to what 'stare decisis' or 'bound by precedent amounted to. There was no compulsion whatsoever, in our view, for Her Ladyship to consider that the High Court was bound to follow *Borhan*'s case, a Court of Appeal decision and exclude in particular the Federal Court decision in *Mohamed Ezam*'s case, which also centred on an arrest and D detention under the very same s 73(1) of the ISA and the correct approach to be adopted by the courts when a challenge was mounted as to the validity of any such arrest and detention.

E **[20]** It is true that the Federal Court had delivered its decision in *Mohamed Ezam*'s case on 6 March 2002 while the Court of Appeal issued its decision in *Borhan*'s case on 25 March 2010. Mohamed Ezam Mohd Noor, the appellant, was the person who had been detained in *Mohamed Ezam*'s case. In *Borhan*'s case, Borhan Hj Daud was the officer who had effected the arrest of one Abdul F Malek Hussain (the respondent there) under the same provision of the law.

[21] Notwithstanding that *Borhan*'s case was a later decision, it was our considered view there was no valid basis not to follow the principles of law laid down and sanctioned by the *Federal Court* in *Mohamed Ezam*'s case, when G dealing with the legality of an arrest and detention made under s 73(1) of the ISA in any subsequent case involving the same provision including the instant case on appeal before us here. *Mohamed Ezam*'s case remained the authority which required the court to enquire whether the impugned arrest was effected for the dominant purpose (as provided for in that provision) and whether there H was sufficient and reasonable grounds behind the belief that such arrest was necessary and in any event that the arrest was not for any ulterior or mala fide ends.

[22] The facts of *Mohamed Ezam*'s case were these. The appellant (together I with others) had been arrested and detained by the police under s 73(1) of the ISA. The High Court had dismissed their applications for *writs of habeas corpus* to be issued to secure their release from that detention. They appealed to the Federal Court. By the time the appeals were heard the appellant was no longer detained under s 73 of the ISA but was being held under the behest of the

Minister under s 8(1) of the ISA. Nevertheless, despite contention by the respondents that the appeal was academic, the Federal Court held the validity or otherwise of the appellant's detention under s 73(1) remained a live issue. A five member bench then went on to consider the appeal and issued four strong separate judgments on what constitutes the correct approach that should be adopted by the court when called to scrutinise the validity of an arrest and detention under s 73(1) of the ISA.

[23] In *Mohamed Ezam*'s case, Mohamed Dzaidin CJ accepted the appellant's contention that the arrest and detention was not for the dominant purpose under s 73(1) of the ISA, ie to enable the police to conduct further investigations on allegedly the appellant's conduct prejudicial to the nation's security but had been on the evidence adduced for a collateral and ulterior motive, namely, to gather intelligence wholly unconnected with national security (p 331).

[24] Steve Shim CJ (Sabah and Sarawak) did not agree that the requirements under s 73(1) of the ISA (... police officer has ... reason to believe) and s 8 of the ISA (... the Minister is satisfied ...) were interlinked or dependant on each other (as was observed in some earlier decisions of the court). It was pointed out that the Minister could make an order under s 8 of the ISA independently of the police investigations. His Lordship went on to hold (p 339) that the subjective judgment accorded to the Minister under s 8 of the ISA is not extended to the police officer in the exercise of his discretion under s 73(1) of the ISA and ruled further as follows:

> ... I take the view that as the arrest and detention by the police officer entail the curtailment of the liberty of a subject a basic and fundamental right, his exercise of discretion under s 73(1) *is therefore subject to the objective test and thus reviewable by a court of law*. The decision of the police officer is objectively justiciable. *This means that the question whether a police officer has the required 'reason to believe' when he makes the arrest and detention in reliance on s 73 (1) is objectively justiciable.* (Emphasis added.)

[25] Abdul Malek Ahmad FCJ expressed the view that the elements of s 73(1) of the ISA are objective and consequently the court was entitled to review the sufficiency and reasonableness of the respondent's reasons for believing that there grounds to justify the appellant's detention. Siti Norma FCJ was also of the further view that the said decision of the police officer could also be scrutinised for mala fides; the appellant there being denied access to legal representation for the entire 60 days was considered to be a violation of art 5(3) of the Federal Constitution and hence it was held that the detention amounted to mala fides in the circumstances.

[26] In *Borhan*'s case, on the other hand, the respondent there was detained

for 57 days under s 73(1) of the ISA before he was released. He then sued the Government for unlawful arrest and detention. In the High Court, it was held that the arrest and detention of the respondent was unlawful because the respondent was not informed of the grounds of his arrest and that there was insufficient evidence adduced by the police to show that the respondent was a threat to the security of the country.

[27] On appeal the Court of Appeal reversed the decision of the High Court. The Court of Appeal held that it was sufficient for the arresting officer to state that he had reasons to believe that the respondent was involved in activities prejudicial to the national security to justify the arrest under s 73(1) of the ISA and the court would not look into the evidence to see whether it was sufficient or otherwise to justify the respondent's arrest. The respondent (detainee) had then applied to the Federal Court for leave to appeal against the Court of Appeal's decision but no leave was granted.

[28] In *Borhan*'s case, Raus Sharif JCA (as His Lordship then was) chose to follow the decision of the Federal Court in *Kam Teck Soon v Timbalan Menteri Dalam Negeri & Ors and other appeals* [2003] 1 MLJ 321 ('*Kam Teck Soon*'s case') which was issued at about the same time as the decision of the same court in *Mohamed Ezam*'s case. However it does not appear that the attention of the Federal Court was drawn to the Federal Court decision in *Mohd Ezam*'s case; only the decision of the High Court in *Mohamad Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 2 MLJ 481 ('*Mohd Ezam*'s case) was annotated to have been referred.

[29] *Kam Teck Soon*'s case involved a consideration of s 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, which had a similarly worded provision to that found in s 73(1) of the ISA — the arresting officer was to have *'... reason to believe that there are grounds ...'.*

[30] Pertinent extracts from the judgment in *Borhan*'s case were as follows:

> [10] At the outset, we need to point out that the arrest of the respondent was not an ordinary arrest. The respondent was arrested under s 73(1) of the ISA. ISA is a special law made under Art 149 of the Constitution, which provides ...
>
> [23] ... *We are aware that what was decided in Kam Teck Soon is in conflict with an earlier decision of the Federal Court in Mohamed Ezam. In Mohamed Ezam, the Federal Court held that the ISA was still subject to the rights entrenched in* art 5(3) and art 149 *could not be used to remove such rights.*
>
> [24] *The existence of two different schools of thought makes it imperative for us to indicate our choice for a better view.* With respect, we subscribe to

and agree with the principle propounded in *Kam Teck Soon*. This is especially so when *Kam Teck Soon is a later decision of the Federal Court.* Being a later decision it must prevail over Mohamed Ezam. This principle was established by the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645.

[25] However, the real issue in the present case is not so much whether the respondent was informed of the grounds of his arrest. Rather, it is whether what the first appellant informed the respondent wa sufficient for the purpose of art 5(3) of the Constitution. It is our considered view that what had been communicated to the respondent by the first appellant was in sufficient compliance with art 5(3) of the Constitution. In fact, the respondent had admitted that he was informed by the first appellant the reasons of his arrest. He was told that he was arrested under the ISA for being involved in activities which was a threat and prejudicial to security of the country.

...

[33] Thus, it is our view that the 1st appellant is not required to inform the respondent the grounds of his arrest in detail. It is absolutely legitimate for the first appellant to state he has 'reason to believe' that there are grounds to justify the respondent's detention under s 73(1) of the ISA. *There is also no requirement for the first appellant to satisfy the court with sufficient particulars and material evidence of the respondent's activities to justify the arrest and detention of the respondent under s 73(1) of the ISA.* Based on the facts of this case, it is our view that the respondent was informed of the grounds of his arrest. What the first appellant informed the respondent was sufficient particulars and thus did not make the arrest and detention of the respondent unlawful. (Emphasis added.)

[31] What must be noted here was that the Court of Appeal in *Borhan*'s case acknowledged that the Federal Court in *Mohamed Ezam*'s case had taken into consideration the fact that ISA was a special legislation but nevertheless the Federal Court had required an objective approach to be taken when dealing with s 73(1) of the ISA. It would therefore appear that *the preference of the Court of Appeal in Borhan's case to go the route of Kam Teck Soon's case* was *purely because Kam Teck Soon's case was the later decision* of the Federal Court, in contrast to that in *Mohamed Ezam*'s case.

[32] The decision in *Borhan*'s case was not, in our assessment, the end-note on the law in this area. The Federal Court in its later decision in *Darma Suria*'s case (as submitted by counsel for the appellant) did review and reaffirm the principles to be applied by the courts as regards justiciability of administrative decisions or when the exercise of discretion by state or its servants were called into question, namely the objective approach, in similar vein as originally expounded to be the law by the Federal Court in *Mohamed Ezam*'s case. (This position had even been conceded to by the learned trial judge in this instant

appeal, save for Her Ladyship's misunderstanding of what 'stare decisis' entailed as discussed above). It was our conclusion that the intervening decision of the Court of Appeal in *Borhan*'s case (influenced to a large extent by the decision of the Federal Court in *Kam Teck Soon*'s case) was therefore no longer good law.

[33] *Darma Suria*'s case involved an order by the Minister of Home Affairs made under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 *('If the Minister is satisfied that ...').* The High Court had dismissed an application for *habeas corpus.* On appeal Gopal Sri Ram FCJ writing for the apex court had this to say:

> [4] It is to be noted that *the section says 'if the Minister is satisfied'. The first question that has to be determined is whether that phrase imports a subjective or an objective element.* A similar statutory formula came up for consideration in *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243. There the words used by the statute were 'If, the Yang di-Pertuan Agong is satisfied'. Interpreting that statutory formula, Suffian LP said:
>
> > It will be noted that s 6 used the formula 'If the Yang di-Pertuan Agong is satisfied etc'. In the past such a subjective formula would have barred the courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned judge, administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular persons considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable — see the cases cited by the learned judge at p 360.
>
> In the same case, Abdoolcader J at first instance had this to say:
>
> > It has been suggested in the past that the qualification of the statement of a power by introductory words in the form of a subjective formula such as His Majesty's satisfaction on the matters specified in s 6(1) of the 1971 Act might be sufficient to exclude judicial review, but the modern and correct view clearly is for an objective approach to the formula to be preferred and this means that the discretion would be reviewable and the deciding authority has in fact to have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds.
>
> [5] *Adopting this test which apart from being binding precedent is the correct statement of the law, in the present instance it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order.* The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order.
>
> [6] There is a principle of ancient repute that:
>
> > *... where the exercise of executive power depends upon the precedent establishment of*

> *an objective fact, the courts will decide whether the requirement has been satisfied. Khawaja v Secretary of State for the Home Department and another appeal* [1983] 1 All ER 765; [1984] AC 74*, per Lord Scarman.*
>
> *And as Lord Kingarth observed in Cameron v Gibson* [2005] CSIH 83:
>
> Equally, the fact that the order may have been made by reason of a mistake in fact or law cannot affect the conclusion that the order was one made ultra vires...when power is given by Parliament to administrative or tribunals to act in limited circumstances, it is well-established that such bodies cannot, by their own mistake of fact, or law in relation to matters circumscribing the limits of their bodies cannot, by their own mistake of fact or law in relation to matters circumscribing the limits of their powers, give themselves powers which they do not have ... (Emphasis added.)

(In *Darma Suria*'s case the Federal Court however went on to dismiss the appeal on the facts of the case.)

[34] The significance of this exposition of the correct law in the Federal Court decision in *Darma Suria*'s case cannot be overstated. What it meant was that when an administrative decision or act was being challenged, the courts were entitled, *notwithstanding even the subjective formulation of the powers*, to objectively scrutinise the exercise of that power to see whether there existed reasonable grounds for that impugned act or decision, in any event well within the purposes of the powers granted in the respective legislation. In other words, there was no longer any room in the law to shut out the purview of the courts to rightfully enquire as to the reasonableness or fairness of any administrative act or decision purely on the basis that the decision maker's exercise of power was subjectively formulated.

[35] As submitted by counsel for the appellant, the relevant law on this issue has yet again been further affirmed by the Federal Court itself in the recent decision in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765 ('the *Titular Archbishop*'s case'). Although in this case an application for leave to pursue with an appeal against a decision of the Court of Appeal was refused (by majority), the lead judgment of the Federal Court by Arifin Zakaria CJ succinctly noted that:

> ... I agree with learned counsel for the applicant that the law on judicial review had advanced from the subjective to that of the objective test. Hence, in Merdeka University Board ...

And, more pointedly:

> In *Darma Suria*'s case, *this court held that if state action affects fundamental rights, the court will not only look into procedural fairness but also substantive fairness.* There must exist a minimum standard of fairness, both substantive and procedural ... (Emphasis added.)

[36] The dissenting judgment of Zainun Ali FCJ in the *Titular Archbishop*'s case also analysed the related developments in law by our courts on this issue and on the question of whether the 'subjective test' was still in vogue, had this to say:

> [202] From this analysis, it can safely be said that *Malaysian courts have been applying the objective test when reviewing Ministerial or an inferior tribunal's decision even if they do not express* it, since the language of Wednesbury unreasonableness is similar to what Suffian LP said in *Merdeka University*'s case. (Emphasis added.)

[37] It must be stressed here that the Federal Court decision in *Mohamed Ezam*'s case, apart from being referred in *Darma Suria*'s case, was also considered by the Federal Court in *Titular Archbishop*'s case, both in the lead judgment as well as in the dissenting judgment referred to above. The decision in *Mohamed Ezam*'s case was neither overruled nor qualified in any way by the learned judges in this recent Federal Court decision as to its applicability when considering the validity of arrests under s 73(1) of the ISA or similarly worded formulation, thereby reinforcing the principle that a decision maker, especially when the act involved a transgression upon the liberties or the curtailment of fundamental rights of an individual, had still to be accountable and satisfy the court as to the sufficiency and reasonableness behind such decision or act.

[38] With reference to the *Borhan*'s case, senior federal counsel for the respondents urged upon us to hold that the refusal of leave by the Federal Court to the respondent there was tantamount to an affirmation of the decision of that Court of Appeal decision by the Federal Court. We did not agree that such refusal of leave could be construed as setting down a binding precedent in respect of (any of the many) the questions of law formulated and proposed in the application for leave by the respondent there; there was no decision on merits, much less on the merits of any specific question proposed to be dealt in the appeal. In any event, as alluded to above, the later decisions of the Federal Court in *Darma Suria*'s case and the *Titular Archbishop*'s case have now conclusively explained the law that ought to be followed by all courts on similar issues. To reiterate, the decision of the Court of Appeal in *Borhan*'s case was not therefore the last word or the binding authority on the subject.

Judicial review or writ action — same objective test

[39] Senior federal counsel for the respondents submitted that the Federal Court decision in *Darma Suria*'s case could be distinguished because *Darma Suria*'s case was a judicial review proceedings (habeas corpus) and was irrelevant in this instant appeal which was a writ action. We could not agree. It was our considered view that the same test, namely the objective test applied, irrespective of whether the challenge on the validity of the exercise of the power to arrest and detain under s 73(1) of the ISA was brought to court by way of a

judicial review proceedings or by a substantive action for damages for wrongful detention. There was no valid basis for any distinction to be made on account only of the different mode of commencement of proceedings for the same end. The subject matter in contention was the same, namely the wrongful incarceration of an individual in violation of his or her normal fundamental right of freedom and the right to be produced in court within 24 hours after any arrest and for appropriate relief either by way of immediate release and/or for damages or compensation for wrongful detention.

[40] Judicial review proceedings in the circumstances of an arrest and detention under s 73(1) of the ISA , as we know it, is usually brought in the form of an application for a writ of habeas corpus (for the 'body' to be produced in court). It was usually taken out when the subject detainee was still in detention, that is, still within the custody and charge of the police. The grounds for such an application would in essence be that the arrest and detention was wrongfully executed and/or not sustainable in law. This, it would be recalled, was the nature of the application originally filed in *Mohamed Ezam*'s case. As earlier noted, by the time the appeal there was heard by the Federal Court, the appellant was however no longer the subject of the arrest and detention under s 73(1) of the ISA — yet the Federal Court proceeded to hear the appeal and emphatically subjected the initial arrest and detention to be objectively tested as to whether it was for sufficient reason and in any event was not made mala fide. The Federal Court held that the arrest was wrongful and the appellant there would have been entitled to the habeas corpus. (There was then a separate suit brought for damages for wrongful detention).

[41] In the instant appeal, the appellant had however filed this suit after having been released some seven days after she was initially arrested in the late hours of the 12 September 2008. The appellant was seeking damages alleging that she had been wrongfully detained. The allegation was the same as would have been in a habeas corpus application if it had been taken out during the currency of any such detention, namely that, there has been a wrongful exercise of the powers provided for under s 73(1) of the ISA and the court should examine whether there was sufficient reasons for the belief purportedly formed by the police officer concerned before executing the said arrest.

[42] There was therefore, in our view, no sensible reason why an action or writ filed for damages by a detainee post-release (for wrongful arrest and detention) should not also be subjected to the same objective test or standards to determine whether the arrest when carried out was lawful, in that, the police officer concerned had sufficient reasons to back-up his belief as required in s 73(1) of the ISA. No valid reason existed to differentiate the test to be applied, one in the case of a judicial review proceeding and another in a writ action involving the same question to be determined by the court. The decision of the

arresting police officer in the appellant's case stood, in our view, to be scrutinised therefore by the very same objective assessment required of the court as laid out by the Federal Court in *Mohamed Ezam*'s case and as affirmed in subsequent Federal Court decisions discussed above.

THE SCHEME BEHIND SECTIONS 73, 8B OF THE ISA

[43] Although not raised by any of the counsel before us, there was another reason, in our considered view, why the test to be applied had to be the objective one when an arrest and detention under s 73(1) of the ISA was called into question at the courts. By the introduction of s 8B by amendments brought to the ISA (ie Act A739 in force since 24 August 1989) only the Minister's decision under s 8(1) of the ISA was expressly barred from being challenged in court.

[44] Section 73 in so far as was material for consideration is reproduced here:

> 73 Power to detain suspected persons
>
> (1) Any police officer may without warrant arrest and detain pending enquiries any person *in respect of whom he has reason to believe* —
>
> (a) that there are grounds which would justify his detention under section 8; and
>
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (2) ...
>
> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 7:
> Provided that —
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
>
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.
>
> (4) deleted

(5) deleted

(6) ...

(7) ...

(Emphasis added.)

[45] Pertinent parts of s 8(1) and of ss 8A, 8B and 8C (introduced by subsequent amendments) are also set out below:

Power to order detention or restriction of persons

8(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as 'a detention order') directing that that person be detained for any period not exceeding two years.

(2) ...

...

...

Detention order not to be invalid or inoperative on certain grounds

8A No detention order shall be invalid or inoperative by reasons —

(a) ...

(b) ...

Judicial review of act or decision of Yang di-Pertuan Agong and Minister

8B(1) *There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made* by the Yang di-Pertuan Agong or the Minister *in the exercise of their discretionary power in accordance with this Act,* save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

(2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 8A

Interpretation of 'judicial review'

8C In this Act, 'judicial review' includes proceedings instituted by way of

(a) an application for any the prerogative orders of mandamus, prohibition and certiorari;

(b) an application for a declaration or an injunction;

(c) a writ of habeas corpus; and

(d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act.

(Emphasis added.)

[46] It was patently obvious that by the aforesaid amendments to ISA the legislature only intended to place the Minister's decision in exercise of the discretionary powers under s 8 of the ISA beyond the reach or scrutiny of the courts. The decision or act of the arresting officer under s 73(1) of the ISA was left intact, meaning that it had to be based upon 'reason to believe', open to be challenged in court by any due process (see s 8C of the ISA) as to its adequacy, propriety or sufficiency by an affected person.

[47] Further the power granted to a police officer to arrest without warrant under s 73(1) of the ISA was not couched in open ended terms but was circumscribed or restricted to be used *only* where there were some belief that grounds existed for a detention under s 8 of the ISA or the person detained had acted or was about to act or likely to act in a manner prejudicial to the security of the country or the maintenance of essential services or the nation's economic life.

[48] Surely where the objectives behind the exercise of any power are specifically spelt out, as in this case, it naturally would follow that the use of that power was limited for those purposes and was to be justified by the person using that power that it had been properly invoked. It would also be noted that the authority of the initial arresting officer (above the rank of an Inspector) to detain was only valid for 24 hours, where after the detention to be valid still required review and exercise of authority by an Assistant Superintendent of Police and subsequently that of Deputy Superintendent of Police.

[49] In our assessment, the hierarchy stipulated for effecting or extending the arrest and detention can only mean that each of the specified officers had to exercise their mind before acting on their entrusted power which had to be within the underlying objectives set out in s 73 of the ISA. It followed from the stipulated procedure to be followed and the reasons required to be satisfied that there was no place in the law for any arbitrary arrest or for an arrest for some extraneous or ulterior end by the police under that provision. The exercise of the discretionary power under s 73 of the ISA when challenged had to stand up to scrutiny by the courts; the courts' jurisdiction to deal with any such

challenge, as highlighted above was not excluded by s 8B of the ISA and remained in place.

FACTS OF THIS CASE

[50] The appellant was arrested by the third respondent ('DW1') on the instructions of ACP Tan Kim Bong ('DW8'), his superior officer. We did not find that by itself to be in any way irregular, (*O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All ER 129 (HL), save that what would now therefore feature would be whether DW8 had sufficient and reasonable grounds or not to order the appellant's arrest late on the night of the 12 September 2008.

[51] The reasons for the arrest of the appellant was set out at para 8 of the amended statement of defence and are reproduced here:

> Alasan-alasan menjustifikasi Defendan Ketiga menangkap Plaintif di bawah s 73(1) AKDN 1960 adalah seperti berikut:
>
> (i) Pada atau lebih kurang Februari 2008 Plaintif telah terlibat di dalam bantahan penggunaan tulisan jawi di papan tanda di jalan raya di sekitar kawasan Parlimen Seputeh Kuala Lumpur dengan cara memasang papan tanda bertulisan rumi, Cina dan Tamil.
> (hereinafter referred to as *'Allegation on the Protest Against Jawi Signages')*
>
> (ii) Sumber-sumber polis ('informer') mendapati bahawa pada Mac 2008 Plaintif dipercayai bertindak bersama-sama segelintir penduduk kawasan perumahan Bandar Kinrara 5, Puchong, Selangor dalam menganjurkan kutipan tandatangan dan membuat petisyen membantah laungan azan Masjid Bandar Kinrara 5.
> *(hereinafter referred to as the 'Allegation on Petition to Reduce Volume of Azan at Masjid Bandar Kinrara 5')*
>
> (iii) Laporan akhbar Urusan Malaysia bertarikh 9 September 2008 bertajuk 'Ada Usaha Larang Azan di Masjid-masjid Selangor' mengenai kenyataan Dato' Seri Dr Mohamad Khir Toyo bahawa terdapat usaha larangan azan di masjid-masjid sekitar Selangor didalangi pihak-pihak tertentu.
> (hereinafter referred to as the '*Allegation in Utusan Article dated 9 September 2008*')
>
> (iv) Penyebaran SMS mengenai penglibatan Plaintif yang berbunyi:
> 'Info Terkini! Pada 26 JUN 2008, TERESA KOK (Ahli Parlimen Seputeh, Naib Presiden DAP) telah mengetuai satu petisyen penduduk di PUCHONG kepada DATO' SATIM DIMAN meminta agar azan Subuh diperlahankan kerana didakwa mengganggu ketenteraman awam. Tahun lepas TAN Seng- Giaw (Timbalan Presiden DAP) meminta azan diperlahankan dalam Parlimen. Tidakkah tindakan mereka ini juga bersifat perkauman dan cuba membakar sentiment bukan Islam? Jika boleh orang Melayu mesti buat laporan polis pada TERESA KOK. Kemudian desak

ANWAR selaku Ketua Pembangkang minta maaf bagi pihak TERESA. Dulu TERESA panggang babi, hina tulisan jawi dan azan Subuh pun dia sudah berani minta perlahan. DAP sudah pijak kepala kita sekarang. Orang Melayu kena bertindak demi agama kita.'

(hereinaftar referred to as the '*Allegations Vide SMS')*

Sesungguhnya ditegaskan bahawa berdasarkan sebab-sebab di atas, terdapat sebab untuk mempercayai bahawa kemungkinan wujudnya ketegangan antara kaum dan agama yang disebabkan dan/atau melibatkan Plaintif.

[52] With regard to the 'Allegations on protest against Jawi signages', there was no documentary or oral evidence adduced that the appellant was personally implicated in the objections or in that campaign. DW8, stated that it was only his personal believe that there was some basis for that allegation but no proof was produced.

[53] It was highlighted to us that the alleged involvement of the appellant was supposed to have taken place in *February 2008* but that the appellant had not been called in by the police anytime then or thereafter to verify that complaint.

[54] It was obvious to us that in any event, this so called reason for belief was no longer an immediate cause for any 'threat' on 12 September 2008, some *seven months later*, when the appellant was arrested under s 73(1) of the ISA and confined in police custody for seven days.

[55] With respect to the *Allegation on petition to reduce the 'Volume of Azan' at Masiid Bandar Kinrara 5*, the allegation was that sometime also in *February 2008* the appellant was behind the gathering of signatories to the petition, which had apparently been signed by 189 residents of Bandar Kinrara 5. It was pointed out to us that the so called petition was attached to an undated and unsigned letter addressed to one, 'YB Dato' Satim Diman' and that none of the signatories (although addresses were provided) nor YB Dato' Satim Diman was called to support the bare claim of the appellant's involvement in that allegation.

[56] Further neither DW8 nor DW2 (the interrogating officer) had seen the original of the petition or conducted any investigation on the veracity of the same or of the appellant's involvement as alleged. *More tellingly*, it was shown and acknowledged by the learned trial judge, that the contents of the petition, (even if it was accepted as good evidence) only called for the volume of the loud speaker to be reduced during 'ceramah, Kuliah Subuh dan Kuliah Maghrib' and not the 'azan'.

[57] Apart from the fact that there was no evidence to even remotely show that the appellant was the person who initiated the petition, there was the evidence of Abdul Rahman bin Nasir ('PW8') who was the Nazir (Chairman) of Bandar Kinrara 5 Mosque from 2006–2010 who denied that the appellant was involved in the petition (received in February 2008) and that he had accordingly told the police so when he was only questioned about the petition sometime in September 2008. PW8 had also maintained the non-involvement of the appellant in a statement he gave and was published in *Malaysiakini* of 13 September 2008.

[58] Further YB Siti Mariah Mahmud ('PW7') had lodged a police report ('P6') on *11 September 2008* (prior to the appellant's arrest, that is,) where the allegation reported in the *Utusan Malaysia* publication of 8 September 2008 was refuted by her, namely, to the effect that no petition against 'azan' had been brought to the Selangor State Assembly sitting. DW8 admitted that he had not taken any statement on the above police report lodged by PW7 before ordering the arrest of the appellant.

[59] As regards the 'Allegation in the *Utusan Malaysia* article dated 9 September 2008' captioned 'Ada Usaha Larang Azan di Masjid-masjid Selangor' relying on a statement purportedly by Dato' Seri Dr Mohamed Khir Toyo made on 8 September 2008, it was highlighted to us that neither the author of that article nor Dato' Seri Mohamed Khir Toyo was called as witnesses to verify the truth of that allegation. No statements were taken from them either by the police.

[60] Although DW8 claimed that the appellant's arrest was prompted by this *Utusan Malaysia* article, this witness agreed that the appellant's name was not mentioned or referred to in that article at all.

[61] To the contrary, at the trial the appellant had adduced evidence though witnesses refuting the purported allegations attributed to Dato' Seri Dr Mohamed Khir Toyo:

(a) PW6, Ahmad Redzuan bin Samsuddin, the Secretary of Kota Damansara mosque from 14 August 2008 to 30 May 2009 confirmed that he was present with Bani bin Mohd when the latter lodged a police report ('P5') on 10 September 2008 refuting the contents of the *Utusan Malaysia* article and explaining that the 'silent' *azan (azan* off the air) was due to technical reasons connected with bad weather and not because of any petition allegedly instigated by the appellant; and

(b) PW3, Fawwaz bin Abdul Aziz, the author of two *Malaysiakini* articles, 'Report lodged against Khir Toyo for stirring up *azan*' published on 11 September 2009 and 'Faulty PA system the cause of 'silent *azan*'

published on 12 September 2009 who testified the public had been made aware of the responses to the baseless statement of Dr Mohamed Khir Toyo.

[62] It was highlighted to us that DW8 had admitted to being aware of the police report P5 and of the two *Malaysiakini* articles but despite that had proceeded to arrest the appellant late on 11 September 2008 without regard to the rebuttals of those allegations, or at least, some further impartial investigations on those allegations.

[63] DW8 had also chosen to ignore the appellant's own denials on her involvement in the petition on the *azan* issue published in *Sinar Harian* of the 8 September 2008, of which DW8 agreed he was aware of, before effecting the arrest on the night of 12 September 2008.

[64] With regard to the *allegations vide SMS* cited by the respondents as additional grounds for the appellant's arrest and detention on 12 September 2008, counsel for the appellant pointed out that DW8 when questioned by the learned trial judge was unable to produce the same (or a transcript of the same) or even to identify it's source. In fact, it was submitted to us, that the senior federal counsel appearing for the respondents had conceded there was no record of any such alleged SMS available at all. It was the appellant's submission that the alleged 'SMS' was fictitious and reference to the same without proof was not an acceptable cause to ground any so called belief.

[65] It must be noted that the above matters raised in the appellant's submissions were not seriously disputed or challenged by the respondents' counsel who seemed contended to just rely on their position that the approach to be taken by the court to satisfy 'reason to believe' of the arresting officer in invoking s 73(1) of the ISA was a subjective one.

[66] What was strikingly glaring from our assessment of the circumstances surrounding the cited grounds for belief leading to the arrest and detention of the appellant was, *firstly*, the so called information on the appellant's alleged conduct claimed to have given rise to suspicion or perception of a threat to national security or public order were rather stale, in that, they had existed since February 2008 or even June 2008. There was no immediate or imminent act of the appellant or any live threat that justified the use of the powers in September 2008 under s 73(1) of the ISA to incarcerate the appellant and trample upon her basic rights and freedom as guaranteed in the Federal Constitution.

[67] *Secondly*, admittedly there had been a total indifference by the police to conduct some preliminary investigation into already available information allegedly implicating the appellant, or even in respect of the material, including

police reports, which had disputed or even positively rebutted the nub of the complaints, namely, that the appellant was allegedly actively involved to silence the *'azan'*. According to DW8 it was the alleged nonfunctioning of the *'azan'* at the Kota Damansara Mosque and the circulation of news surrounding this incident which was the immediate cause for the appellant's arrest. Prior to 12 September 2008, it would be recalled, this was fully rebutted and the police was aware of this. Further, no where in the *Utusan Malaysia*'s article was the appellant's name mentioned or the appellant shown to be connected with such general allegation that 'Ada Usaha Larang Azan di Masjid-masjid Selangor'. This disregard by the police can only point towards a suspicion that the objectives of the police's move were not to use the powers vested in them under the ISA for any legitimate or justifiable purpose as solemnly required under the provisions of the ISA in the first place but, as it would appear, was for a collateral or unrelated ulterior motive. This manifested itself clearly when the appellant was subsequently released *within seven days* accompanied with the exculpating statement that the police was satisfied that she was not a threat to public order and security.

[68] *Thirdly*, there was always open to the police under the law other avenues to deal with the appellant even if there were some merits in the complaints raised implicating the appellant. There ought to have been proper investigation commenced relating to the complaints when they were first received in February 2008 and even if there was any sustainable basis for such allegation, then the appellant ought to have been prosecuted under possibly s 298 or even perhaps s 298A(1) of the Penal Code.

[69] In our assessment therefore the respondents had failed to show the court credible and sufficient material to establish that the arresting officer (or his superiors) had reasonable and substantive grounds to support their belief that the arrest of the appellant was urgently required to meet the ends as provided in s 73(1)(a) and/or (b).

[70] In our considered view therefore this appeal warranted our appellate intervention as clearly the learned trial judge had misdirected herself on the law as to the correct test to be applied, and further had not given sufficient or due consideration to all the materials placed before the court. The respondents, in this case, had failed to show that there was any immediate or reasonable ground to back the arresting officers' or his superior's (DW8) belief of an imminent threat by the appellant to public order, unless she was arrested and detained under the powers provided in s 73(1) of the ISA.

[71] Accordingly, the orders of the High Court including the order of costs made against the appellant, are hereby set aside.

[72] We are also of the further view that apart from an award of general damages for the wrongful arrest and detention, the circumstances and matters surrounding this case warrant an order for exemplary and aggravated damages as well against the respondents.

[73] The Court of Appeal in its recent decision in *Sistem Televisyen Malaysia Bhd & Ors v Nurullah bt Zawawi & Anor* [2015] 6 MLJ 703; [2015] 9 CLJ 357, had occasion to review the principles governing the award of exemplary and aggravated damages by the courts. *Exemplary damages* may be awarded where a plaintiff was injured by the oppressive, arbitrary or unconstitutional action by the executive or the servant of the government or the defendant's conduct has been calculated to make a profit (in excess of the compensation that may be ordered) or where a statute had expressly authorised it. This case, in our assessment, fell squarely within the first category. *Aggravated damages* may be awarded within compensatory principles, where there was any kind of highhanded, oppressive, or insulting conduct evident by the defendant's behaviour which went to affect the plaintiff's pride, position, reputation or standing in the society.

CONCLUSION

[74] Although the ISA has now been repealed, the principles that have been laid down in *Mohamed Ezam*'s case and affirmed in the later Federal Court decisions in *Darma Suria*'s case and the *Titular Archbishop*'s case are prescriptive of the requirement that the objective test should be applied by the courts, at all levels of the judicial hierarchy that is, when dealing with provisions similar in terms with s 73(1) of the ISA or even where the decision maker's powers are expressed in a subjective formulation in any statute. This was so especially where inroads against the liberty of an individual and of other freedoms enshrined in the Federal Constitution are even permitted by the law in specific situations to meet declared national interests.

[75] The provisions available on the rule book should not be used by the authorities to harass or intimidate any person but only for purposes that are legitimate to meet the specified objectives and sustainable, in any event, before a court of law for reasonableness and substance, if challenged.

[76] Having given our utmost and most serious consideration to matters discussed and elaborated above, and having taken into consideration the appellant's status and position at the material time, we further order that the respondents pay the appellant, the following:

(a) a sum of RM200,000 as general damages;

(b) the further sum of RM150,000 in a lump sum, as aggravated and exemplary damages; and

(c) a sum of RM70,000 as costs here and below, subject to allocatur.

[77] The deposit is ordered to be refunded to the appellant.

Appeal allowed with costs of RM70,000

Reported by Kohila Nesan